(7)

No. 88-125

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

LEWIS SIMON and S-J FINANCIAL CORPORATION,

Petitioners,

VS.

F/S AIRLEASE II, INC., GREYCAS, INC. and THE SWIG INVESTMENT COMPANY AIRCRAFT TRUST NO. 1,

Respondents.

BRIEF IN OPPOSITION OF RESPONDENT THE SWIG INVESTMENT COMPANY AIRCRAFT TRUST NO. 1

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Aircraft Trust No. 1

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Preliminary Statement

Respondent The Swig Investment Company Aircraft Trust No. 1 respectfully requests that this Court deny the petition for a writ of certiorari filed by Petitioners Lewis Simon and S-J Financial Corporation (collectively "Simon"). The petition seeks review of the opinion of the Third Circuit Court of Appeals filed on March 21, 1988, the judgment entered in accordance therewith, and the order of the Third Circuit Court of Appeals dated April 19, 1988 denying Simon's petition for rehearing.

QUESTIONS PRESENTED

1. Can a sophisticated professional person (such as Simon), who was represented throughout by counsel, deliberately circumvent the prior approval and disclosure requirements of Bankruptcy Code (11 U.S.C.) Section 327(a) and Bankruptcy Rule 2014(a), *inter alia*, by instructing the debtor, in order to "avoid creating an adversary situation [with creditors]," that no approval of his employment should be sought from the bankruptcy court until after the court and creditors first approved the results of that employment?

(The Third Circuit determined that Simon cannot seek retroactive appointment and compensation in these circumstances.)

2. Can a sophisticated professional person (such as Simon) (a) obtain retroactive appointment from the bankruptcy court and (b) seek payment of substantial fees from the debtor's estate, under an arrangement which was never disclosed to creditors and which, if approved, would result in prejudice to creditors by rendering successful reorganization impossible?

(The Third Circuit determined that Simon cannot seek retroactive appointment and compensation in these circumstances.)

3. Does Bankruptcy Code authority to pay a professional person (such as Simon) from a bankruptcy estate for services

rendered in a bankruptcy case flow (a) from 11 U.S.C. Section 503(b)(1)(A) (which authorizes generally the payment of "actual and necessary costs and expenses of preserving the estate") or (b) exclusively from 11 U.S.C. Section 503(b)(2) (which deals specifically with the compensation of professionals, and incorporates by reference 11 U.S.C. Section 330 and the prior appointment requirements of 11 U.S.C. Section 327[a])?

(The Third Circuit held that 503[b][2] is the exclusive subdivision of 11 U.S.C. Section 503 permitting compensation of professionals from the bankruptcy estate.)

4. Even if authority to pay professionals can be read into 11 U.S.C. Section 503(b)(1)(A), does it follow that 11 U.S.C Section 327(a) requiring, *inter alia*, prior court appointment and Bankruptcy Rule 2014(a) requiring, *inter alia*, advance disclosure of proposed fee arrangements, would be inapplicable to a professional person seeking payment under 11 U.S.C Section 503(b)(1)(A)?

(The Third Circuit did not address this question.)

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Opinions Below

The Opinion of the Third Circuit Court of Appeals, is reported at 844 F.2d 99 (3d Cir. 1988). The Third Circuit entered its judgment in accordance with that opinion on March 21, 1988, and denied Simon's motion for rehearing by order dated April 19, 1988. The text of the order denying Simon's motion for rehearing appears in Appendix A to Simon's petition.

The opinion of the district court is reported at 84 B.R. 389 (W.D. Pa. 1986). The text of the order entered in accordance

with that opinion on October 21, 1986 appears in Appendix B to Simon's Petition.

The opinion of the bankruptcy court is reported at 59 B.R. 796 (Bankr. W.D. Pa. 1986). The text of the order entered in accordance with that opinion on April 14, 1986 appears in Appendix C to Simon's Petition.

Statutes and Rule Involved

1. **11 U.S.C. § 327(a)** (Allowing a trustee or debtor-in-possession in bankruptcy, *inter alia*, to employ, "with the Courts approval . . . professional persons . . . to represent or assist the trustee [or debtor-in-possession] in carrying out the trustee's [or debtor's] duties under this title".)

2. **Bankruptcy Rule 2014(a)** (Providing that an application for an order approving the employment of professional persons in bankruptcy must state, *inter alia*, "the specific facts showing the necessity for the employment, the name of the person to be employed, the reasons for the selection, the professional services to be rendered, [and] any proposed arrangement for compensation. . . .")

3. **11 U.S.C. § 330(a)** (Permitting a bankruptcy court to award "reasonable compensation" to "a professional person employed under section 327. . . .")

4. **11 U.S.C. § 503(b)(2)** (Permitting payment, as an administrative expense in bankruptcy, of "compensation and reimbursement awarded [to professional persons] under Section 330 of this title. . . .")

5. **11 U.S.C. § 503(b)(1)(A)** (Permitting payment, as an administrative expense in bankruptcy, of "the actual, necessary costs and expenses of preserving the estate, including wages,

salaries, or commissions for services rendered after the commencement of the case. . . .")

The text of relevant portions of the foregoing statutes and rule is annexed as Appendix A hereto.

STATEMENT OF THE CASE

Background of this Bankruptcy

This is a Chapter 11 bankruptcy case involving the reorganization of F/S Airlease II, Inc., the debtor-in-possession ("F/S" or "Debtor"). The sole asset of the Debtor is an 18 year leasehold estate in a Boeing aircraft, owned by The Swig Investment Company Aircraft Trust No. 1 ("Swig" or "Owner").

In a series of related transactions in 1980, F/S (a) purchased the aircraft with financing secured by a first mortgage on the aircraft provided by Greycas, Inc. ("Greycas" or "Secured Lender"), (b) leased the aircraft for a ten year term to Air Florida, (c) sold the aircraft, subject to Greycas' mortgage and subject to the Air Florida lease and (d) leased the aircraft back from Swig for an 18 year term. The monthly rental payments made by Air Florida were just sufficient to pay the Greycas mortgage installments of $103,394 per month. (A 62, 713)

In July, 1984, Air Florida filed for bankruptcy, thereby terminating its lease with F/S and depriving F/S of its sole source of income to satisfy it obligations to Greycas. Shortly thereafter, in August, 1984, F/S filed this Chapter 11 bankruptcy proceeding. Greycas is the principal secured creditor of the Debtor, and Swig is one of the principal unsecured creditors.

The Aloha Airlines Lease

In July, 1984, Simon executed two letter agreements with the Debtor agreeing to release the aircraft for a fixed fee of $100,000 plus expenses.* *See* Third Circuit Opinion, 844 F.2d at 101-102. The text of those July, 1984 letters is annexed as Appendix B hereto. The terms of those letters were communicated to Swig (*ibid*), but were not disclosed to the court prior to commencement of Simon's services.

Between September and November, 1984, Simon negotiated a ten year lease for the aircraft with Aloha Airlines, providing for net rentals of $90,000 per month. As already stated, the debt service under the Greycas mortgage was $103,394 per month. (A 62, 713) Thus, the rent paid under the Aloha lease (which is the only current source of payment for all creditors) leaves an unpaid shortfall on the secured debt alone of $13,394 per month. Because of this shortfall there would be a substantial balloon payment (estimated to be in excess of $2 million; A 1339) due in December, 1994, instead of a fully paid mortgage in July, 1990. Payment of substantial commissions to Simon would materially increase the balloon on the secured debt. Unsecured creditors must look to the residual value of the aircraft in December 1994, at the expiration of the Aloha lease, for payment of their claims. Payment of brokerage commissions of $450,000 -- the amount sought by Simon -- might well result in the failure of this debtor to reorganize, and in conversion of this case to one of liquidation under Chapter 7. Severe prejudice to unsecured creditors would result.

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* Yet Simon is seeking $450,000 in commissions.

Simon's Circumvention of the Prior Approval and Disclosure Requirements of Bankruptcy Code Section 327(a) and Rule 2014(a)

No order of approval was sought or obtained prior to Simon's retention, as required by Bankruptcy Code Section 327(a). Nor was any application made to the bankruptcy court, prior to Simon's retention, disclosing his proposed compensation terms, as required by Bankruptcy Rule 2014(a). The Third Circuit found:

> Simon did not seek the requisite prior approval from the court when [Debtor's] bankruptcy began, nor did he seek approval at any time during the four month period in which he was performing his services. Not until June 3, 1985 -- almost a year from when he commenced his services and a full seven months from the date he had concluded them -- did Simon petition the court for payment of administrative expenses.

(Third Circuit Opinion, 844 F.2d at 107.)

On November 28, 1984, one day before a hearing in bankruptcy court to approve the Aloha Airlines lease, Simon's counsel sent a letter to Debtor' counsel confirming their agreement that the Debtor *not* seek Simon's appointment at that time but, rather, that the issue at the hearing would be confined to confirmation of the Aloha Lease. The text of that letter is annexed as Appendix C hereto.

Simon's counsel represented to the Third Circuit that he made this agreement to "avoid creating an adversary situation prior to approval of the [Aloha Airlines] lease." Brief for Appellees'/Cross-Appellants' Lewis J. Simon and S-J Financial Corporation (served on April 22, 1987 and filed in the Third Circuit) at 13. The Third Circuit found:

> Simon is a sophisticated businessman who was represented by attorneys throughout the course of his dealings with [Debtor] . . . The evidence here suggests that Simon's attorney was familiar with the requirements of section 327(a). In the November 28, 1984 letter written by his attorney to Airlease, Simon agreed to limit the request for court approval to the lease only, reserving questions "regarding the distribution or allocation of the proceeds from the Aloha Airlines lease." App. at 792.

(Third Circuit Opinion, 844 F.2d at 107.)

* * *

> Simon testified at the hearing about the lease; however he did not seek his appointment as broker or approval of his services at that time. Rather, as Simon and [Debtor] had agreed, the sole issue raised at that hearing was the confirmation of the lease.

(Third Circuit Opinion, 844 F.2d at 102.)

Finally, "[i]n June, 1985, ten months after Simon began his efforts to remarket the plane and seven months after the Aloha lease was executed and approved by the bankruptcy court," Simon applied to the bankruptcy court for a fee of $450,000. 844 F.2d at 102. This fee was four and a half times the $100,000 fee which the creditors had been lead to believe Simon would accept.

Analyzing these facts in light of the factors enumerated in *In the Matter of Arkansas Company, Inc.*, 798 F.2d 645 (3d Cir. 1986), the Third Circuit concluded that no "extraordinary circumstances" existed warranting suspension of the prior approval and disclosure requirements of the Bankruptcy Code and Rules.

The Third Circuit also found that to entertain Simon's belated, surprise demand for $450,000 would have a potentially devastating impact on the bankruptcy estate and the creditors:

> [T]he order [of the district court] has a significant impact on the assets of the bankruptcy estate; the amount Simon seeks represents a substantial portion of the assets of the estate, and an award to him at this point will severely affect the rights of the other creditors. In fact, a delay in the final resolution of this matter could have an adverse impact on the debtor's successful reorganization under Chapter 11.

(Third Circuit Opinion, 844 F.2d at 104.)

As set forth herein, the rules respecting prior approval of a debtor's employment of professionals and prior disclosure of professional fees are designed for the protection of creditors from unexpected or unnecessary charges. Had Simon been required here, prior to commencement of his services, to disclose to the creditors and the court that he would be seeking a $450,000 fee, the creditors would have had the opportunity to oppose Simon's appointment or to remarket the aircraft themselves, at no cost to the bankruptcy estate. Greycas, the secured lender, is in the business of aircraft leasing. Greycas contends that it could have released the aircraft at no cost to the estate.

The deliberate failure to obtain prior approval of Simon's employment deprived the creditors of the opportunity to know in advance what services would be provided by the professional and at what cost. *Nunc pro tunc* approval of Simon's employment, permitted by the bankruptcy and district courts, placed Simon in a better position then he would have been in had he complied with the Bankruptcy Code and Rules and, indeed, in a better position than if there had been no bankruptcy. The Third Circuit correctly reversed these rulings.

REASONS WHY THE WRIT SHOULD BE DENIED

It is undisputed that Simon (a) was not appointed by the Court in advance and (b) agreed in writing that the Debtor was *not* to raise the issue of his employment and compensation until after the Aloha Lease was approved. Simon's counsel states that this was done in order to "avoid creating an adversary situation." The only questions properly raised by the instant Petition are (a) whether, in the above-described circumstances, Simon is entitled to equitable relief in the form of *nunc pro tunc* appointment, excusing the failure to observe the prior appointment and disclosure requirements of the Code and Rules and (b) whether Simon can escape the prior appointment and disclosure requirements by seeking compensation under Code Section 503(b)(1)(A)? As shown herein:

(1) these questions were fully considered and properly decided by the Third Circuit,

(2) the opinion below does not conflict with the decision of any other court of appeals, and

(3) no federal question is presented that is sufficiently important to warrant review by this Court.

1. Simon's Claims Were Fully Considered and Properly Decided by the Third Circuit

Simon is plainly wrong in suggesting that the bankruptcy code "does not mandate *prior* approval" of professional employment. Petition at 48. Indeed, for more than half a century, courts of appeals have uniformly interpreted Bankruptcy Code Section 327(a) and similar predecessor statutes to require that professional persons performing services in bankruptcy obtain

advance approval of their employment from the court in order to recover fees from a bankruptcy estate.*

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* **Second Circuit**

Matter of Futuronics Corp., 655 F.2d 463, 468-69 (2d Cir. 1981), *cert. denied*, 455 U.S. 941, 102 S. Ct. 1435 (1982) (Denying compensation from bankruptcy estate, *inter alia*, for attorneys who had been appointed as general counsel for debtor-in-possession but who had never received court approval to perform work in specified litigation. The court stated that "it has long been the practice in this Circuit to deny compensation to counsel who fail to comply with . . . [former Bankruptcy] Rule 215 [predecessor to Code Section 327(a)] (superceding [former Bankruptcy] General Order 44)");

Meyer v. C & H Trading Corp., 242 F.2d 510 (2d Cir. 1957) (Denying trustee's petition for compensation of accountants who rendered professional services without prior order approving their employment or fixing their compensation, pursuant to former Bankruptcy General Order 45);

In re Progress Lektro Shave Corp., 117 F.2d 602, 603-604 (2d Cir. 1941) (Denying free application by attorneys who rendered services "of a character to be rendered by an attorney for the trustee" on grounds that the attorneys had not been appointed in advance pursuant to former Bankruptcy General Order 44);

In re Eureka Upholstering Co., 48 F.2d 95 (2d Cir. 1931) (Lerned Hand, J.) (Denying free award to attorneys who performed services for bankruptcy receiver, but who were not appointed by the court as required by former Bankruptcy General Order 44. Judge Hand stated that "[a] similar rule was before the Supreme Court in *Weil v. Neary*, 278 U.S. 160, 49 S. Ct. 144, 73 L.Ed. 243 [1928], where it was held that its disregard not only prevented the attorney from recovering any compensation, but even invalidated an agreement to share the fees of the attorney actually appointed by the court. . . . [W]ithout an order of the court not only may an attorney not be retained, but he can recover nothing no matter how beneficial or how

(continued...)

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*(...continued)

arduous his services. . . . Only [through prior court appointment] can claims be avoided for volunteered services, which may or may not have been such as the receiver would, or should, have authorized.");

Third Circuit

Matter of Arkansas Company, Inc., 798 F.2d 645, 649 (3d Cir. 1986) (Denying retroactive appointment of attorneys who failed to obtain advance court approval as required by 11 U.S.C. Section 327(a). Held that "*nunc pro tunc* approval should be limited to cases where extraordinary circumstances are present. Otherwise, the bankruptcy court may be overly inclined to grant such approval influenced by claims of hardship due to work already performed.");

Matter of Calpa Products Company, 411 F.2d 1373, 1374 (3d Cir. 1969) (Denying fee application by attorneys who rendered "services of the type normally rendered by the attorney for the Trustee" based upon the "failure of counsel to obtain appointment as attorney for the trustee in accordance with [former Bankruptcy] General Order 44.");

In re National Tool & Mfg. Co., 209 F.2d 256 (3d Cir. 1955) (Reversing compensation order on grounds that applicant "was not appointed as an attorney for the trustee . . . in the manner required by [former] General Order 44. . . .");

Fifth Circuit

Matter of Triangle Chemicals, Inc., 697 F.2d 1280, 1289 (5th Cir. 198) (Holding that *nunc pro tunc* appointment of professionals whose employment by debtor was not approved in advance by the bankruptcy court should be limited to "rare or exceptional circumstances. . . .");

Matter of Computer Utilization, Inc., 508 F.2d 673, 675 (5th Cir. 1975) (Denying compensation from bankruptcy estate to attorneys retained by debtor who "were not appointed to render services in accordance with

(continued...)

Moreover, it is undisputed that brokers retained by a debtor-in-possession or trustee are "professional persons" within the meaning of Bankruptcy Code Section 327(a). *See, e.g., In re Sergio, Inc.*, 39 B.R. 522 (D. Hawaii, 1984); *In re Grim*, 35 F. Supp. 15 (E.D. Pa. 1940) (Denying claim for recovery of brokerage commission from bankruptcy estate on grounds that broker's employment had not been approved as required by former Bankruptcy General Order 45. The court held that former General Order 45 [referring, *inter alia*, to the employment of auctioneers] applied equally to the employment of real estate brokers.)

In order to recover fees under the "professional person" sections of the bankruptcy code and rules, Simon would have to be able to demonstrate "extraordinary circumstances" warrant-

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*(...continued)
[former] General Order 44");

Eighth Circuit

Knotts v. Westphal, 746 F.2d 1329, 1330 (8th Cir. 1984) (Affirming order directing attorney for debtor to refund fees to bankruptcy estate where attorney "never applied to the [bankruptcy] court under 11 U.S.C. Section 327(a) for approval of representation.");

Albers v. Dickinson, 127 F.2d 957, 961 (8th Cir. 1942) (Surcharging bankruptcy trustee for payments made to attorneys who had not been appointed in advance pursuant to former General Order 44.);

Ninth Circuit

In re THC Financial Corp., 837 F.2d 389, 391-92 (9th Cir. 1988) (Holding that "under [former bankruptcy] rule 215, lobbyists like real estate brokers, must obtain court approval of their employment," and that no retroactive approval could be granted because no "exceptional circumstances" existed).

ing *nunc pro tunc* appointment pursuant to the Court's equitable powers. *See, e.g., Matter of Arkansas, supra*, 798 F.2d 645, 649 (3d Cir. 1986). Rather than excusing Simon's failure, the record herein shows that Simon intentionally delayed seeking approval of his employment in order to "avoid . . . creating an adversary situation." *Supra* at 6-7.

The rules respecting prior approval of professional services and disclosure of proposed fees are designed for the protection of creditors and the estate from unexpected or unnecessary charges. *See, e.g., In re Sapolin Paints, Inc.*, 38 B.R. 807, 817 (Bankr. E.D.N.Y. 1984):

> We are not dealing here with a mere technicality. The necessity for an order [authorizing profession services in advance] affords an *opportunity to interested parties to object to the requested expenditures as unnecessary.*

(Emphasis added.) Thus, the "adversary situation" which Simon sought to avoid by delaying application for approval of his employment, was his expectation that Swig and the other creditors would object to Simon's appointment at a $450,000 fee -- a right afforded to creditors under the bankruptcy code and rules.

The Third Circuit further rejected Simon's claim that Bankruptcy Code Section 503(b)(1)(A) presents an alternative basis for compensation of professional persons who perform their services without prior court approval. The Third Circuit held:

> The authority to pay administrative expenses for professionals, and a real estate broker, like an attorney, is a professional, is found *not* in section 503(b)(1)(A) but in section 503(b)(2) which permits payment of an administrative expense for "compensation and reimbursement awarded under section 330(a)." Section 330(a), in turn, empowers the court to award "reason-

> able compensation" to, *inter alia*, a "professional person employed under section 327." Because Simon is a profession person who was hired to "assist the [debtor-in-possession] in carrying out the [debtor-in-possession's] duties," *See* 11 U.S.C. § 327(a), and he failed to comply with that section's requirement to obtain prior approval of his appointment, he cannot rely on section 503(b)(1)(A) as a way of circumventing section 327(a). *See In re Mansfield Tire & Rubber Co.*, 65 B.R. 446, 465-66 (Bankr. N.D. Ohio 1986). If Simon were able to be compensated under section 503(b)(1)(A), it would render 327(a) nugatory and would contravene Congress' intent in providing for prior approval.

(Third Circuit Opinion, 844 F.2d at 108-09. Footnote omitted.)

This holding simply follows the well settled principle of statutory construction that "[w]here there is no *clear* intention otherwise, a specific statute will not be controlled or nullified by a general one . . ." *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, ___ U.S. ___, 107 S.Ct. 2494, 2499 (1987); *see also*, *Busic v. United States*, 446 U.S. 398, 406, 100 S. Ct. 1747, 1753 (1980).

Here, the Third Circuit was called upon to construe two separate provisions of a single statutory scheme. 503(b)(2), by its terms, is the more specific provision, applying only to professional persons employed by a trustee or debtor-in-possession. That section permits compensation as an administrative expense of awards made under Section 330(a) which, in turn, incorporates by reference, the prior approval requirements of Section 327(a).

503(b)(1)(A), on the other hand, is the more general provision, which does not apply to professional persons precisely because those persons are covered by 503(b)(2). Simon is a professional person. Every court below has so held and Simon has never contested his status as a professional person.

If the construction urged by Simon were adopted by this Court the professional compensation provisions of Code Sections 503(b)(2), 330(a) and 327(a), and the prior disclosure requirements of Bankruptcy Rule 2014(a) all would be nullified or could be readily circumvented. Rather than follow these specific requirements, any professional (be he a broker, lawyer or engineer) could enter the bankruptcy proceeding silently and unchecked, and charge the estate with belated, surprise demands for fees not previously disclosed to creditors or to the court.

Since both provisions are part of the same statutory scheme and were enacted at the same time, obviously there is no "*clear* intention" for Section 503(b)(2) to be "controlled or nullified" by Section 503(b)(1)(A). *Crawford Fitting Co., supra.* On the contrary, the Third Ciruit read these provisions together in the only logical way possible by recognizing that Section 503(b)(2) applies to "professional persons" and Section 503(b)(1)(A) does not.

2. The Opinion Below Does Not Conflict with the Decision of Any Other Court of Appeals

Simon contends that the opinion below is in conflict with the Fourth Circuit opinion in *Goodman v. Philip R. Curtis Enterprises, Inc.*, 809 F.2d 228, 231 n. 4 (4th Cir. 1987). However, the attorney in *Goodman* had received a prior appointment by the bankruptcy court, pursuant to an order requiring "advance approval of expenditures . . ." 809 F.2d at 230. Thus, *Goodman* provides no authority for Simon's contention that a professional person may escape the prior approval and disclosure requirements of the Bankruptcy Code and Rules by seeking compensation under 503(b)(1)(A).

Simon reads a footnote in *Goodman* to stand for the proposition that professional persons may be compensated under section 503(b)(1)(A). 809 F.2d at 231, n. 4. However,

the language relied upon by Simon is clearly *dicta* since the Fourth Circuit vacated the fee award in that case based upon other procedural irregularities.

Even if the *dicta* cited by Simon could be elevated to the level of a holding, the opinion below presents no conflict whatsoever with *Goodman* since the attorney in *Goodman*, unlike Simon here, complied with the prior appointment requirement of Section 327(a).

3. No Federal Question is Presented that is Sufficiently Important to Warrant Review by this Court

Simon erroneously suggests that the opinion below will have far reaching effect by "send[ing] a message to business people such as [Simon] that their efforts to rehabilitate insolvent debtors-in-possession are undertaken at their own peril." Petition at 31. However, the only persons affected by the opinion below are professional persons who, like Simon, deliberately attempt to circumvent the prior appointment and approval requirements of the bankruptcy code and rules.

This court denied certiorari to consider the Second Circuit opinion in *Matter of Futuronics Corp.*, *supra*, 655 F.2d 463 (2d Cir. 1981), *cert. denied*, 455 U.S. 941, 102 S.Ct. 1435 (1982), which disallowed a fee application seeking compensation, *inter alia*, for attorneys who failed to comply with the prior disclosure requirements of former Bankruptcy Rule 215 (predecessor to section 327[a]). The only question sought to be reviewed by Simon which was not also present in *Futuronics* is whether professionals who fail to comply with the prior appointment and disclosure requirements can escape these requirements by seeking compensation under Code Section 503(b)(1)(A), rather than 503(b)(2). As we have shown, the Third Circuit's determination of this issue gives the only logical interpretation possible to these two subdivisions of 11 U.S.C. Section 503(b) which, as so construed, are in harmony with one another. The

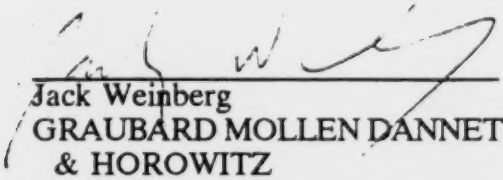
Third Circuit's construction presents no federal question warranting review by this Court.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Dated: New York, New York
August 18, 1988

Respectfully submitted,



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APPENDIX A

APPENDIX A

1. **[11 U.S.C.] § 327. [Pub. L. 95-598, Nov. 6, 1978]. Employment of Professional Persons.**

   (a) Except as otherwise provided in this section, the trustee, with the Court's approval, may employ one or more attorneys, accountants, appraisers, auctioneers, or other professional persons, that do not hold or represent an interest adverse to the estate, and that are disinterested persons, to represent or assist the trustee in carrying out the trustee's duties under this title.

2. **[Bankruptcy] Rule 2014. [1983] Employment of Professional Persons.**

   (a) **Application for and Order of Employment.**
   An order approving the employment of attorneys, accountants, appraisers, auctioneers, agents or other professional persons pursuant to § 327 or § 1103 of the Code shall be made only on application of the trustee or committee, stating the specific facts showing the necessity for the employment, the name of the person to be employed, the reasons for his selection, the professional services to be rendered, any proposed arrangement for compensation, and, to the best of the applicant's knowledge, all of the person's connections with the debtor, creditor, or any other party in interest, their respective attorneys and accountants.

   * * *

   Advisory Committee Note (1983)

   Subdivision (a) is adopted from the second sentence of former Bankruptcy Rule 215(a). The remainder of that rule is covered by § 327 of the Code.

3. **[11 U.S.C.] § 330. [Pub. L. 95-598, Nov. 6, 1978, as amended by Pub. L. 98-353, Title III, § 433, July 10, 1984]. Compensation of Officers.**

(a) After notice and a hearing, and subject to sections 326, 328 and 329 of this title, the court may award to a trustee, to an examiner, to a professional person, employed under section 327 or 1103 of this title, or to a debtor's attorney -

(1) reasonable compensation for actual, necessary services rendered by such trustee, examiner, professional person, or attorney, as the case may be, and by any paraprofessional person employed by such trustee, professional person or attorney, as the case may be, based on the nature, the extent and the value of such services, the time spent on such services, and the cost of comparable services other than in a case under this title; and

(2) reimbursement for actual necessary expenses.

4. **[11 U.S.C.] § 503. [Pub. L. 95-598, Nov. 6, 1978]. Allowance of administrative expenses.**

(b) After notice and a hearing, there shall be allowed administrative expenses, other than claims allowed under section 502 (f) of this title, including -

(2) compensation and reimbursement awarded under section 330 of this title;

5. **[11 U.S.C.] § 503. [Pub. L. 95-598, Nov. 6, 1978]. Allowance of administrative expenses.**

(b) After notice and a hearing, there shall be allowed administrative expenses, other than claims allowed under section 502(f) of this title, including -

(1)(A) the actual, necessary costs and expenses of preserving the estate, including wages, salaries, or commission for services rendered after the commencement of the case;

APPENDIX B

APPENDIX B

July 20, 1984

FEDERAL EXPRESS

Mr. Harold L. Lehman
Vice President, Treasurer
F/S Airlease II, Inc.
Suite 404
1000 RIDC Plaza
Pittsburgh, Pennsylvania 15238

Re: Remarketing of Boeing 737-200

Dear Mr. Lehman:

In line with and pursuant to our telephone conversation of today we confirm that we will undertake at this time to remarket the Boeing 737-200 aircraft that is presently on lease with Air Florida. Insofar as F/S Airlease II, Inc. is concerned, our right to remarket and receive compensation therefor is derived from the settlement agreement dated May 27, 1983 and the addendum thereto dated June 8, 1983.

We further confirm that you will immediately transmit a check in the amount of $20,000 as an advance to cover all reasonable expenses in connection with the remarketing of the aircraft. We understand that our attorneys, Kasdin & Nathanson, will act as the escrow agent for the advance and that we will account for the expenses incurred and return that portion of the advance, if any, not used for reasonable expenses.

We also understand that discussions will occur between yourselves and the owner regarding our marketing fee. Specifically, we understand that you will request the owner to pay a $100,000 remarketing fee, net of expenses, in the event we obtain a new lease for the aircraft at this time. In the event that the owner agrees to pay us that amount, we agree to

accept such a fee for re-leasing the aircraft at this time, in lieu of the re-leasing fee set forth in the settlement agreement and addendum, subject to our right to remarket the aircraft at the conclusion of such a lease and receive the compensation set forth in the settlement agreement and addendum.

Very truly yours,

S-J FINANCIAL CORPORATION

By /s/_____
[Lewis Simon,] President

RECEIVED, ACCEPTED AND APPROVED this 13 day of Aug. 1984.

F/S AIRLEASE II, INC.

By /s/_____
[Harold L. Lehman,
V.P. & Treasurer]

July 30, 1984

FEDERAL EXPRESS

Mr. Harold L. Lehman
Vice President, Treasurer
F/S Airlease II, Inc.
Suite 404
1000 RIDC Plaza
Pittsburgh, Pennsylvania 15238

Re: Remarketing of Boeing 737-200

Dear Mr. Lehman:

In line with and pursuant to our recent telephone conversation we confirm that we will undertake at this time to remarket the Boeing 737-200 aircraft that is presently on lease with Air Florida. Insofar as F/S Airlease II, Inc. is concerned, our right to remarket and receive compensation therefor is derived from the settlement agreement dated May 27, 1983 and the addendum thereto dated June 8, 1983.

We further confirm that you have transmitted a check in the amount of $20,000 as an advance to cover all reasonable expenses in connection with the remarketing of the aircraft. We understand that our attorney, Kasdin & Nathanson, will act as the escrow agent for the advance pursuant to an escrow agreement and that we will account for the expenses incurred and return that portion of the advance, if any, not used for reasonable expenses.

We also understand that discussions will occur between yourselves and the owner regarding our remarketing fee. Specifically, we understand that you will request the owner, and use your best efforts to obtain the owner's agreement, to pay us a $100,000 remarketing fee, net of expenses, in the event we obtain a new lease for the aircraft at this time. We must be notified of the owner's decision on or before August 3, 1984. In the event that the owner agrees to pay us that amount, we

agree to accept that amount plus any rental amount per month that exceeds the debt service, as the fee for re-leasing the aircraft at this time, in lieu of the re-leasing fee set forth in the settlement agreement and addendum, subject to our right to remarket the aircraft at the conclusion of such a lease and receive the compensation set forth in the settlement agreement and addendum.

Very truly yours,

S-J FINANCIAL CORPORATION

By /s/_____
[Lewis Simon,] President

RECEIVED, ACCEPTED AND APPROVED this 21st day of Aug. 1984.

F/S AIRLEASE II, INC.

By /s/_____
[Harold L. Lehman,
V. P. & Treasurer]

APPENDIX C

APPENDIX C

November 28, 1984

FEDERAL EXPRESS

Mr. Bruce McCullough
Buchanan, Ingersoll, Rodewald,
Kyle and Burger
57th Floor - 600 Grant Street
Pittsburgh, Pennsylvania 15219

Re: F/S Airlease II Bankruptcy

Dear Mr. McCullough:

In line with our telephone conversation of today we confirm that the debtor will not seek to obtain, and will oppose any effort by any other party to obtain, any ruling by the federal bankruptcy court at the hearing on November 29, 1984 regarding the distribution or allocation of the proceeds from the Aloha Airlines lease. Rather, the debtor, through your offices, will only seek the bankruptcy court's approval of the lease itself. Accordingly, the question of allocation and distribution of the payment derived from the lease will be resolved at a later date. Based upon your representations, our offices will not appear at the hearing to approve the lease. We further confirm, however, that you will spread of record and include in any order approving the lease the fact that S-J Financial Corporation, by and through Lewis B. Simon, initiated, procured and negotiated the Aloha Airlines lease.

We appreciate your cooperation in this matter.

Very truly yours,

PJN:mpg

Philip J. Nathanson